Lee Cher Joo @ Lee Sujan & Anor v Mohd Sharif bin Othman & Ors

HIGH COURT (MUAR) — CIVIL SUIT NO 23–8 OF 2005
AHMADI ASNAWI JC
29 JANUARY 2009

Criminal Procedure — Arrest — Wrongful arrest — Arrest made based on complaint — Whether based on false report — Whether there was reasonable suspicion of commission of seizable offence — Whether arrest by implication of law or constructive arrest — Whether arrest in accordance with s 23(1)(a) of the Criminal Procedure Code — Criminal Procedure Code ss 15(1) & 23(1)(a)

Evidence — Admissibility — Oral evidence — Failure to plead alleged earlier arrest — Whether evidence not raised in pleadings be raised as evidence in court

Evidence — Documentary evidence — Police report — Police report by plaintiffs after arrest and release — Whether police report was contemporaneous document of events on day of plaintiffs' arrest

The first plaintiff and his son ('the second plaintiff') were arrested based on a complaint lodged by one Tan Yie Sin ('the complainant') on 30 June 2005. In the complaint the complainant had alleged that he was chased by the plaintiffs armed with parangs while he was tapping rubber on his plot of rubber land, in Buloh Kasap, Segamat. Upon receiving this complaint the investigation officer of the case ('the IO') invited the plaintiffs to the Balai Polis Buloh Kasap for an interview. According to the IO the interview lasted from about 6.30pm to 9pm and that throughout this time both the plaintiffs were at liberty to go wherever they wanted. The IO also clarified that the interview had lasted this long because of the first plaintiff's habit of repeating his answers and his rights over the land that the complainant was trespassing. During the interview it came to pass that the plaintiffs had cumulatively lodged a series of police reports since 2005 (not less than 14 police reports) prior to the present complaint by the complainant. These reports by the plaintiffs were in respect of the alleged cheating perpetrated by the complainant and one Chew Teck against the plaintiffs and the plaintiffs' land. In the interview the first plaintiff had also said that the present complaint by the complainant was false and that the first plaintiff had only attempted to chase trespassers out of his land. At the end of this interview the plaintiffs

were then moved to Balai Polis Segamat for a continuation of the interview and were arrested in that station at about 10pm. Both the plaintiffs claimed that they had been wrongly arrested and detained by the first and second defendants at Balai Polis Segamat because their arrest was based on a false report and that further the police investigations that were based on that false report were also flawed. The plaintiffs therefore sought, inter alia, special damages of RM500, general damages to be assessed and punitive and exemplary damages against all four defendants. Although the plaintiffs had additionally claimed for malicious prosecution and an order of mandamus against the third defendant, these claims were later dropped and the plaintiffs confined their claim to wrongful arrests and detention only. During the trial the first plaintiff testified that although the plaintiffs were invited to come to the Balai Polis at 6.30pm they were asked to wait until 9pm and that both he and the second plaintiff were arrested by implication of law from 6.30pm until 9pm before being taken to Balai Polis Segamat. This evidence in court was an obvious departure from the plaintiffs' pleaded case which averred to the substance of their claim being their wrongful arrest and detention in Balai Polis Segamat at about 10pm. Although the first plaintiff testified at first that he did not chase the complainant with a parang, under cross-examination he admitted doing so on the grounds that the complainant was trespassing on his land. The first plaintiff submitted that the investigation was conducted in difference of the law in that, inter alia, the police failed to take into account his age, poor hearing and limited understanding of Bahasa Malaysia; that the police had neither explained the reasons for his arrest nor interpreted those reasons if any to him; and that he was not given an opportunity to tender an explanation. The second plaintiff's evidence was more or less in tandem with the first plaintiff's. The IO testified that as the complaint was in respect of a seizable offence he had proceeded to interview the complainant and thereafter the plaintiffs. Thereafter based on a reasonable suspicion that the plaintiffs had committed the seizable offence complained of he had them transferred to Balai Polis Segamat for a second interview before their subsequent arrest at about 10pm. On the next day, while the plaintiffs were in detention at the Balai Polis Segamat lock-up, the IO had sent the investigation papers to the deputy public prosecutor (DPP) who directed him to charge both the plaintiffs under s 506 of the Penal Code. The issue in this action was whether the arrest of the plaintiffs was proper and lawful in all the circumstances of the case.

Held, dismissing the plaintiffs' claim with costs:

(1) The plaintiffs were barred from ventilating their claim that they were wrongfully arrested as early as 6.30pm upon their arrival at Balai Polis Buloh Kasap because they had not pleaded this in their pleadings. The law is clear that parties are bound by their pleadings and as such their

evidence about the wrongful arrest at Balai Polis Buloh Kasap was inadmissible. In fact both the plaintiffs' claim warranted dismissal on this ground alone (see para 11).

(2) In any event, although the earlier arrest at Balai Polis Buloh Kasap was not pleaded, the facts as adduced did not support their averments. It was imperative upon the plaintiffs to discharge the burden that they were in fact arrested at the Balai Polis Buloh Kasap according to the law as embodied in s 15 of the Criminal Procedure Code ('CPC'), which does not provide for arrest by implication of law or rather constructive arrest. The evidence of the plaintiffs showed that both plaintiffs were not subjected to any acts that amounted to an arrest. They testified that the police officers at the Balai Polis Buloh Kasap had informed them to wait till 9pm but there was no evidence that the plaintiffs were prevented from leaving that station at any point of time. The fact that the plaintiffs were told to wait went to show that there was no arrest during the time that the plaintiffs were at the Balai Polis Buloh Kasap. The willingness to wait or agreeing to wait was not equivalent to being put under arrest. Thus there was no evidence cogent enough to justify the inference of any form of arrest having taken place while the plaintiffs were present at Balai Polis Buloh Kasap from 6.30pm to 9pm (see paras 16–18).

(3) The testimony of the IO, which was in tandem with the course of events as testified by both plaintiffs, also showed that the plaintiffs were arrested only at about 10pm at Balai Polis Segamat and that there was no arrest of the plaintiffs at the Balai Polis Buloh Kasap. The fact that the IO was not cross-examined about this evidence amounted to an acceptance by the plaintiffs of the IO's evidence in respect of the same, in particular that the plaintiffs were not under any form of arrest during the times they were present at Balai Polis Buloh Kasap (see paras 19–20).

(4) The arrest at Balai Polis Segamat at about 10pm was not negligently or wrongfully done. The first plaintiff lodged a police report two days after his release from the Balai Polis Segamat lock-up wherein he indicated that both the plaintiffs were told why they were called to the police station and were informed of the impending arrests. This document, which is the plaintiff's own document, is a contemporaneous document recording the events that took place on 30 June 2005 and an unequivocal admission by the plaintiffs that they knew why they were called to the police station (see paras 22–23).

(5) The instruction given by the IO to arrest the plaintiffs was well within s 23(1)(a) of the CPC, which required an arrest to be made when there was reasonable suspicion of an offence having been committed. In fact the IO in this case had done all the right things before directing an

A arrest and he had also acted promptly and reasonably in referring the investigation papers to the DPP (see paras 30 & 33).

[Bahasa Malaysia summary

B Plaintif pertama dan anak lelakinya ('plaintif kedua') telah ditangkap berdasarkan aduan yang dibuat oleh Tan Yie Sin ('pengadu') pada 30 Jun 2005. Dalam aduan itu pengadu telah mendakwa bahawa dia telah dikejar oleh plaintif-plaintif yang membawa parang semasa dia menoreh getah di
C plot ladang getahnya, di Buloh Kasap, Segamat. Selepas menerima aduan ini pegawai penyiasat kes tersebut ('PP') telah menjemput plaintif-plaintif ke Balai Polis Buloh Kasap untuk ditemu bual. Menurut PP temu bual itu berjalan dari lebih kurang pukul 6.30 petang hingga 9 malam dan sepanjang masa tersebut kedua-dua plaintif bebas bergerak ke mana sahaja mereka
D ingini. PP juga menjelaskan bahawa temu bual itu mengambil masa kerana tabiat plaintif pertama mengulangi jawapannya dan haknya ke atas tanah tersebut yang mana pengadu menceroboh. Semasa temu bual didapati bahawa plaintif-plaintif secara kumulatif telah membuat beberapa laporan polis sejak 2005 (tidak kurang daripada 14 laporan polis) sebelum aduan ini
E oleh pengadu. Laporan-laporan tersebut oleh plaintif-plaintif adalah berkaitan penipuan yang dikatakan telah dimulakan oleh pengadu dan Chew Teck terhadap plaintif-plaintif dan tanah plaintif-plaintif. Dalam temu bual tersebut plaintif pertama juga mengatakan bahawa aduan ini oleh pengadu adalah palsu dan bahawa plaintif pertama hanya cuba untuk
F mengejar penceroboh keluar dari tanahnya. Di akhir temu bual ini plaintif-plaintif kemudian telah dipindahkan ke Balai Polis Segamat untuk sambungan temu bual tersebut dan telah ditangkap di balai itu lebih kurang pukul 10 malam. Kedua-dua plaintif menjawab bahawa mereka telah ditangkap dan ditahan secara salah oleh defendan-defendan pertama dan
G kedua di Balai Polis Segamat kerana tangkapan mereka adalah berdasarkan laporan palsu dan bahawa siasatan lanjut polis yang berdasarkan laporan palsu tersebut juga cacat. Plaintif-plaintif dengan itu memohon, antara lain, ganti rugi khas berjumlah RM500, ganti rugi am yang perlu ditaksirkan dan ganti rugi punitif dan teladan terhadap kesemua empat defendan-defendan.
H Meskipun plaintif-plaintif telah menambah tuntutan untuk pendakwaan berniat jahat dan perintah mandamus terhadap defendan ketiga, tuntutan-tuntutan tersebut kemudiannya telah digugurkan dan plaintif-plaintif menghadkan tuntutan mereka kepada tangkapan dan tahanan salah sahaja. Semasa perbicaraan plaintif pertama memberi
I keterangan bahawa meskipun plaintif-plaintif telah dijemput ke Balai Polis pada pukul 6.30 petang mereka diminta menunggu sehingga pukul 9 malam dan bahawa dia dan plaintif kedua telah ditangkap menurut undang-undang dari pukul 6.30 petang hingga 9 malam sebelum dibawa ke Balai Polis Segamat. Keterangan ini di mahkamah jelas bercanggah dengan kes yang

diplidkan oleh plaintif-plaintif yang menegaskan teras tuntutan mereka adalah tangkapan dan tahanan salah di Balai Polis Segamat lebih kurang pukul 10 malam. Meskipun plaintif pertama memberi keterangan yang pada mulanya dia tidak mengejar pengadu dengan parang, semasa pemeriksaan balas dia mengaku berbuat demikian atas alasan yang pengadu telah menceroboh tanahnya. Plaintif pertama menghujahkan bahawa siasatan dijalankan bertentangan dengan undang-undang di mana, antara lain, polis telah gagal mengambil maklumat tentang umurnya, pendengarannya yang kurang dan pemahaman Bahasa Malaysianya yang terhad; bahawa polis tidak menjelaskan sebab-sebab tangkapannya mahupun mentafsirkan sebab-sebab tersebut jika ada kepadanya; dan bahawa dia tidak diberikan peluang untuk mengemukakan penjelasan. Keterangan plaintif kedua lebih kurang sama dengan plaintif pertama. PP memberi keterangan bahawa memandangkan aduan adalah mengenai kesalahan boleh ditangkap dia telah meneruskan dengan menemu bual pengadu dan kemudian plaintif-plaintif. Selepas itu berdasarkan rasa syak munasabah yang plaintif-plaintif telah melakukan kesalahan boleh ditangkap seperti yang telah diadukan dia telah memindahkan mereka ke Balai Polis Segamat untuk temu bual kedua sebelum tangkapan mereka yang selanjutnya lebih kurang pukul 10 malam. Pada keesokan harinya, semasa plaintif-plaintif dalam tahanan di lokap Balai Polis Segamat, PP telah menghantar kertas-kertas siasatan kepada timbalan pendakwa raya ('TPR') yang telah mengarahnya untuk membuat pertuduhan ke atas kedua-dua plaintif di bawah s 506 Kanun Keseksaan. Isu dalam tindakan ini adalah sama ada tangkapan plaintif-plaintif wajar dan sah di sisi undang-undang berdasarkan keseluruhan keadaan kes.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos:

(1) Plaintif-plaintif dihalang daripada menyuarakan tuntutan mereka bahawa mereka telah ditangkap secara salah seawal 6.30 petang setibanya mereka di Balai Polis Buloh Kasap kerana mereka tidak memplidkan ini dalam pliding mereka. Undang-undang adalah jelas bahawa pihak-pihak terikat oleh pliding-pliding mereka dan oleh itu keterangan mereka tentang tangkapan salah di Balai Polis Buloh Kasap tidak boleh diterima. Bahkan tuntutan kedua-dua plaintif wajar ditolak atas alasan ini sahaja (lihat perenggan 11).

(2) Walau bagaimanapun, meskipun tangkapan awal di Balai Polis Buloh Kasap tidak diplidkan, fakta-fakta yang dikemukakan tidak menyokong penegasan-penegasan mereka. Adalah imperatif untuk plaintif-plaintif melepaskan beban yang mereka sebenarnya telah ditangkap di Balai Polis Buloh Kasap menurut undang-undang seperti yang termaktub dalam s 15 Kanun Prosedur Jenayah ('KPJ'), yang tidak memperuntukkan untuk tangkapan yang secara tak langsung menurut

undang-undang atau tangkapan konstruktif. Keterangan plaintif-plaintif menunjukkan bahawa kedua-dua plaintif tidak tertakluk kepada apa-apa tindakan yang membentuk tangkapan. Mereka telah memberi keterangan yang pegawai-pegawai polis di Balai Polis Buloh Kasap memaklumkan mereka untuk tunggu sehingga 9 malam tetapi tiada keterangan yang plaintif-plaintif dihalang meninggalkan balai itu pada bila-bila masa. Hakikat bahawa plaintif-plaintif diberitahu untuk menunggu menunjukkan bahawa tiada tangkapan dibuat semasa plaintif-plaintif di Balai Polis Buloh Kasap. Kerelaan untuk menunggu atau bersetuju untuk menunggu tidak sama dengan diletakkan di bawah tangkapan. Oleh itu tiada keterangan yang meyakinkan untuk menjustifikasikan inferens tentang apa-apa bentuk tangkapan telah berlaku semasa plaintif-plaintif di Balai Polis Buloh Kasap dari pukul 6.30 petang hingga 9 malam (lihat perenggan 16–18).

(3) Keterangan PP, yang sama dengan pelaksanaan kejadian-kejadian seperti yang diterangkan oleh kedua-dua plaintif, juga menunjukkan bahawa plaintif-plaintif hanya ditangkap lebih kurang pada pukul 10 malam di Balai Polis Segamat dan tiada tangkapan dibuat ke atas plaintif-plaintif di Balai Polis Buloh Kasap. Fakta bahawa PP tidak memeriksa balas tentang keterangan ini membentuk penerimaan oleh plaintif-plaintif terhadap keterangan PP berkaitan yang sama, khususnya tentang plaintif-plaintif di bawah apa-apa bentuk tangkapan semasa mereka berada di Balai Polis Buloh Kasap (lihat perenggan 19–20).

(4) Tangkapan di Balai Polis Segamat lebih kurang pada pukul 10 malam tidak dilakukan dengan cuai atau salah. Plaintif pertama telah membuat laporan polis dua hari selepas pembebasannya daripada lokap Balai Polis Segamat di mana dia mengatakan bahawa kedua-dua plaintif telah diberitahu kenapa mereka dipanggil ke balai polis dan dimaklumkan tentang tangkapan-tangkapan yang akan berlaku. Dokumen ini, yang merupakan dokumen plaintif sendiri, adalah dokumen semasa yang merekodkan kejadian-kejadian yang berlaku pada 30 Jun 2005 dan pengakuan nyata oleh plaintif-plaintif yang mereka mengetahui kenapa mereka dipanggil ke balai polis (lihat perenggan 22–23).

(5) Arahan yang diberikan oleh PP untuk menangkap plaintif-plaintif memang terangkum dalam s 23(1)(a) KPJ, yang menghendaki tangkapan dibuat di mana terdapat rasa syak yang munasabah tentang kesalahan yang telah dilakukan. Bahkan PP dalam kes ini telah melakukan semua yang sepatutnya sebelum mengarahkan tangkapan dan dia juga bertindak dengan segera dan munasabah semasa merujukkan kertas-kertas siasatan kepada TPR (lihat perenggan 30 & 33).]

Notes

For a case on oral evidence, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 92.

For cases on police report, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1207–1211.

For cases on wrongful arrest, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 798–812.

Cases referred to

Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)

Lim Hock Boon v PP [2007] 1 MLJ 46; [2007] 4 CLJ 114, CA (refd)

PP v Kang Ho Soh [1992] 1 MLJ 360; [1991] 3 CLJ 2914; (1991) 3 CLJ (Rep) 557, HC (refd)

Roshan Beevi v Joint Secretary of Tamil Nadu (1984) Cr LJ 134 (refd)

Saul Hamid bin Pakir Mohamad v Inspektor Abdul Fatah bin Abdul Rahman and Anor [2007] 6 MLJ 47; [2007] 5 CLJ 93, CA (refd)

Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (refd)

Wong Kok San v WH Salt [1952] MLJ 204, HC (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Criminal Procedure Code ss 15, 15(1), 23(1)(a)

Criminal Procedure Code [IND] s 46

Penal Code s 506

Rashid Mokhtar (Rashid Mokhtar & Co) for the plaintiffs.

Amarjit Singh (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Ahmadi Asnawi JC:

[1] Both the plaintiffs claimed to have been wrongly arrested and detained by the first and second defendants at Balai Polis Segamat at about 10pm on 30 June 2005 pursuant to Buloh Kasap Polis Report No 640/05 lodged by one Tan Yie Sin ('640/05 report'). The said Tan Yie Sin had alleged that earlier in the day he was chased by both the plaintiffs armed with parangs while he was tapping rubber on his plot of rubber land known as Lot No 644 and Lot No 743, Kampung Kuala Paya, Buloh Kasap Segamat. For the said wrongful arrests and detention, both the plaintiffs, inter alia, claimed the following against all the four defendants:

(i) RM500 in special damages;

(ii) General damages to be assessed; and

(iii) Punitive and exemplary damages.

[2] At the stage of submissions, the plaintiffs dropped their claim under para 27(d) of their prayers for an order of mandamus against the third defendant. The plaintiffs also abandoned their claim for malicious prosecution. They are now confining their claim for wrongful arrests and detention only.

[3] The first plaintiff (PW1) testified that on 30 June 2005 he went to Balai Polis Buloh Kasap with his son, the second plaintiff (PW2) at about 6.30pm in response to the Balai's requests for them to come over. At the Balai, he was not allowed to speak and was asked to wait till 9pm. Neither was the second plaintiff allowed to speak. At about 9pm, several policemen from Balai Polis Segamat arrived and took him and the second plaintiff to Balai Polis Segamat. They gave no reasons why both of them were taken to Balai Polis Segamat. At about 11pm both of them were arrested and detained at the lock-up of Balai Polis Segamat. They were released only the next day in the evening. The first plaintiff could not now remember the time of his released.

[4] In evidence the first plaintiff now claimed that he and the second plaintiff were arrested by implication of law (?) at 6.30pm when they were at Balai Polis Buloh Kasap till 9pm before being taken to Balai Polis Segamat. This evidence is obviously a departure of the pleaded case as indicated in para 9 of their statement of claim. Paragraph 9 only talks about the wrongful arrests and detention effected at Balai Polis Segamat. The remaining paragraphs in their statement of claim also adverted to the same.

[5] The first plaintiff denied ever chasing the complainant (of 640/05 report) with a parang. However, under cross-examination, he admitted chasing the complainant out of his rubber land on grounds that the complainant was infact trespassing on his lands known as Lot No 644 and Lot No 743, the same pieces of land mentioned and claimed by the complainant to be his in his 640/05 report.

[6] The first plaintiff further claimed that the 640/05 report was a false report and that the police investigation was flawed on account that it was based upon a false report.

[7] He denied that his brother's undivided share over the said lands was purchased by one Chew Teek and the said Chew Teek subsequently sold the said undivided share to the complainant (Tan Yie Sin). Though the first plaintiff was shown his own police reports at pp 75–77 of lampiran 52 (the plaintiffs bundle of documents) he denied any knowledge that Chew Teek had purchased his brother's undivided share on the said lands. He claimed

that the said lands were registered wholly under his own name. The complainant's name was not registered as co-owners in the land titles of the said land. Neither was Chew Teek's.

[8] The first plaintiff further claimed that the investigation was conducted in difference of the law in that:

(i) The police failed to take into account his old age, his poor hearing and his limited understanding of Bahasa Malaysia;

(ii) The police did not explain the reasons for his arrest and no interpretation was provided to explain the reasons for his arrest;

(iii) He was questioned by five to six policemen, making him to suffer headache, confusion and becoming frightened. He was not allowed to seek the assistance of his son over questions which he could not understand or hear and was admonished by the police for doing so; and

(iv) He was not given the opportunity to speak and explain what really happened. The police refused to listen to his explanation that his lands were being trespassed upon.

[9] The testimony of the second plaintiff (PW2) more or less appeared to be in tandem with the first plaintiff's.

[10] Now, in all the circumstances of the case were the plaintiffs' arrested by implication of law commencing 6.30pm to 9pm at Balai Polis Buloh Kasap on 30 June 2003 as alleged by the plaintiffs? If there were, were such arrests and subsequent detention wrong in law? This is now the thrust of the plaintiff's claim. However this very important issue was not pleaded in their statement of claim. As said earlier, para 9 of their statement of claim is only about their wrongful arrests and detention at Balai Polis Segamat and in their evidence this took place at about 11pm. Very plainly this issue was only raised in their examination-in-chiefs through their witnesses' statement.

[11] The law is clear. Parties are bound by their pleadings. Anything not pleaded is a no go. Having not pleaded the thrust of their claim in their pleadings, the plaintiffs are now barred from ventilating their claim that they were wrongfully arrested as early as 6.30pm upon their arrival at Balai Polis Buloh Kasap. Such evidence is plainly inadmissible. It amounted to a mere after-thought without more. Both the plaintiffs' claim warranted dismissals on this ground alone.

[12] Notwithstanding the above, is there now such a thing as arrest by implication of law? If what is actually meant is constructive arrest, then the law is clear. The law as embodied in s 15 of the Criminal Procedure Code

(CPC) only provides for 'arrest'. It does not provide for constructive arrest. The authorities further suggested that whether a person is under arrest or not is a question of fact to be decided upon the circumstances of the case. His Lordship Gopal Sri Ram JCA, in *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46; [2007] 4 CLJ 114 at p 120 said '… whether a person is under arrest is an issue of inferential fact. In other words, it is a fact that is to be reasonably inferred from proved or admitted facts. No better passage than that from the judgment of Shanker J in *Public Prosecutor v Kang Ho Soh* [1992] 1 MLJ 360; [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 is needed to bring home the point: '… But whether in a particular case a person was under actual arrest at a given moment in time is a question of fact to be decided according to the circumstances of each case …' (See also *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306 at p 311).

[13] Section 15(1) of the CPC showed us the mode of arrest and what it entails:

> In making an arrest the police officer or other person making the same shall actually touch or confined the body of the person to be arrested unless there is submission to the custody by word or action.

[14] Section 15 of our CPC is in pari materia with s 46 of the Indian Criminal Procedure Code. In *Roshan Beevi v Joint Secretary of Tamil Nadu* (1984) Cr LJ 134, the said section was given the following meaning:

> In other words, if the person to be arrested submits to the authority or control of the arrester, the latter need not touch or confine the body of the person to be arrested.

[15] Further down the court added:

> There must be actual seizing or touching and in the absence of that, it must be brought to the notice of the person to be arrested that he is under compulsion and consequent upon it, the said person should submit to that compulsion and then only the arrest is consummated.

[16] Adverting to the case before me, notwithstanding that the plaintiffs had departed from their pleaded case and notwithstanding that they had failed to plead in their pleadings that they were arrested at Balai Polis Buloh Kasap from 6.30pm till 9pm, nevertheless the facts as adduced does not support their averments as such. It is necessary to pause here and state that it is imperative upon the plaintiffs to discharge the burden that they were infact arrested at the said Balai in the manner aforesaid provided by law, in particular s 15(1) of the CPC upon the notion that there is no such thing as arrest by implication of law or rather, constructive arrest.

[17] The evidence indicated that both the plaintiffs admitted coming to Balai Polis Buloh Kasap on their own volition. Both the plaintiffs did not state that immediately upon their arrival at the Balai or at any other time thereafter they were told by any officer who attended to them that they were placed under arrest. Both did not state that they were confined to any particular locality within the Balai. Both did not state that their freedom were restricted within the Balai or outside the Balai. Both did not state that they were not free to leave the Balai or to go home. Both the plaintiffs also did not state they have by word of mouth or by their actions, submitted to the custody of the officer or officers attending to them. Both also did not state that they were actually touched by any officer or officers attending to them to indicate that they were arrested or placed under arrests. Neither were their bodies confined by the officer or officers making the arrests. They were also not given any notice that they were under any compulsion and that consequent upon it, they submitted to that compulsion.

[18] In their own words, they were only told to wait till 9pm. In my view this does not amount to an arrest, for if they were infact already arrested by then, there is no necessity for the officers to tell them to wait till 9pm. They have all the time in the world, albeit, 24 hours, to deal with both the plaintiffs after making the arrests if at all they were already under arrests as soon as they arrived at the Balai. The fact that they were told by the police to wait till 9pm merely goes to show that there were no arrests during the times the plaintiffs were at the Balai. There is a world of a difference between telling the person to wait and arresting the person. It was neither a compulsion. The willingness to wait or obliging the officer is equally not a submission to the compulsion on account that at the material time the plaintiffs were at liberty either to agree/comply or leave the Balai. The willingness to wait or agreeing to wait is not equivalent to being put under arrest. There were no evidence that the plaintiffs were prevented from leaving the Balai at any point of time.

[19] The testimony of the investigation officer of the case, DW3, is in tandem with the course of events as testified by both plaintiffs. He said that both the plaintiffs came to the Balai voluntarily. They were invited for an interview over the report lodged by the complainant, Tan Yie Sin. The interview lasted from 6.30pm to 9pm. Throughout the duration, both the plaintiffs were at liberty to go where they may want to go. Both the plaintiffs were known to the police and were local residents of Buloh Kasap. They could be located easily if the police wanted them. After that both the plaintiffs were invited to his office at Balai Polis Segamat for the continuation of the interview and for further instructions from his superiors as the plaintiffs had cumulatively lodged a series of police reports since January 2005 (not less than 14 police reports) prior to the report lodged by Tan Yie Sin. The interview took a little longer as the first plaintiff was in the habit of

repeating over and over his answers, his rights over the said lands, the alleged fraud and cheating perpetrated by Chew Teck and the complainant and the falsity of the report lodged by the complainant (640/05 report) and that he has every right to chase trespassers out of his lands. Both the plaintiffs were arrested only at about 10pm at Balai Polis Segamat.

[20] There was no cross-examination of the gist of DW3's evidence enumerated above. This amounted to an acceptance by the plaintiffs of DW3's evidence in respect of the same in particular that both the plaintiffs were not under any form of arrest during the times they were present at Balai Polis Buloh Kasap. They were only being questioned regarding their involvements in the complaint lodged by the complainant. In addition, the first plaintiff admitted under cross-examination that he was questioned by the police at the Balai. It was thus decided in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213 that '… *on this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony* …'

[21] Adverting to the facts and the law relevant to the issues, it is thus my findings that both the plaintiffs were not under any form of arrest during the times they were present at Balai Polis Buloh Kasap from 6.30pm to 9.30pm. The facts and circumstances of the case does not warrant the inference that the plaintiffs were under any kind of arrest during the times or at any moment of time they were there at Balai Polis Buloh Kasap. There is no evidence cogent enough to justify the inference of an arrest having taken place. The plaintiffs failed to discharge the burden that they were indeed under arrest then. The facts were wholly at variance with *Wong Kok San v WH Salt* [1952] MLJ 204, the authority relied by the plaintiffs. It is thus in-appropriate to rely on this authority. The first plaintiff's police report shown at pp 100–103 of *lampiran 52* also adverted to the fact that they were only arrested at Balai Polis Segamat at 11pm. Equally the plaintiffs also failed to show the presence of common law arrest during the times they were there in terms as enumerated in *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219, to the effect that '… *an arrest occurs when a police officer states in terms that he is arresting or when he uses force to restraint the individual concerned. It occurs also when by words or conduct he makes it clear that he will if necessary, use force to prevent the individual from going where he may want to go* …'

[22] It is also the gist of the plaintiffs' case that they were not told of the grounds of their arrests and have no inkling whatsoever why they were arrested. However the evidence suggested otherwise. The first plaintiff lodged a police report — Segamat Report No 3859/05 — on 3 July 2005, barely three days after his arrest and two days after his release (at pp 100–103 of

lampiran 52). A perusal of this report clearly indicates that both the plaintiffs were told why they were called to the Balai and were informed of the impending arrests. At p 101 para (e) the first plaintiff stated:

> (e) Anggota polis berkenaan telah memberitahu ada orang telah membuat repot polis terhadap saya pada 30.6.2005. Antara lain orang tersebut yang dimaklumkan kepada saya dikenali sebagai 'potong babi punya anak' (pengadu tersebut) merepotkan saya telah angkat parang, kejar dan serang beliau dalam kebun milik saya sendiri pada pagi 30.6.2005 tersebut. Oleh itu anggota polis tersebut memaklumkan saya telah melakukan kesalahan dan akan didakwa di bawah seksyen 506 Kanun Keseksaan (KK).

[23] This report/document is the first plaintiff's own document. It is a contemporaneous document, recording the events that took place on 30 June 2005. The excerpt extracted above clearly fly in the face of the plaintiffs' evidence in court. It is an unequivocal admission that the plaintiffs were told why they were called to the Balai, that the first plaintiff had committed an offence and that he would soon be charged under s 506 of the Penal Code.

[24] Additionally, DW3 testified that both the plaintiffs contended that the complainant, Tan Yie Sin had lodged a false report and was lying when he (complainant) claimed that he is the owner of the said land. The first plaintiff contended that he is the owner of the said lands and as such has every right to eject/drive out trespassers who came trespassing and stealing the proceeds from or of the said lands. This evidence, which was not challenged, clearly shows that the plaintiffs knew pretty well what the matter was all about when they were initially called to Balai Polis Buloh Kasap.

[25] For the reasons given above I have no hesitation in dismissing both the plaintiffs averments that they were not aware of the reasons why they were called to the Balai and that they were not told of the grounds of their arrests.

[26] The police report lodged by the first plaintiff referred to above (at pp 100–103) of *lampiran 52* is a very long and detailed report. It was made in perfect Bahasa Malaysia. No interpreter was required at the time of lodging the report and no interpreter was required to explain the contents of the same to the maker of the report, ie the first plaintiff. It appears then that the first plaintiff is well versed in Bahasa Malaysia. Now the first plaintiff testified that the police did not take into account his poor understanding of Bahasa Malaysia. However, in the light of the above, I think it is a hollowed claim designed to magnify and add spice of his allegations against the defendants.

[27] Both the plaintiffs testified that they were arrested at Balai Polis Segamat at about 11am. These were their original pleaded case. DW2 who effected the arrests testified that the arrests took place at about 10pm. DW3 who instructed DW2 to make the arrests also said the arrests were made at 10pm. Both the plaintiffs contended that there was no proper investigation, that the arrests were negligently done, and that the said arrests were wrongful. Now we will examine the facts.

[28] DW3 testified that the 640/05 report lodged by the complainant Tan Yie Sin, revealed that the persons against whom the report was lodged had committed a seizable offence. He took the complainant's statement and the complainant also identified the plaintiffs as the perpetrators of the crime to him. He also took both the plaintiff's statement twice — once at Balai Polis Buloh Kasap and the other at Balai Polis Segamat. Based on the police report and on what he has done thus far, he was satisfied that there was a reasonable suspicion that both the plaintiffs had committed the offence as complained. Then he instructed DW2 to arrest both the plaintiffs for further investigations. Both plaintiffs were then detained at the lock-up of Balai Polis Segamat. Both the plaintiffs were eventually released at about 5pm the next day on police bail (pp 3 and 4 of the defendant's bundle of documents — lampiran 66).

[29] Next DW3 sent the investigation papers to the learned DPP. The learned DPP then directed him to charge both the plaintiffs under s 506 of the Penal Code. The charge sheet is indicated at pp 5 and 6 of lampiran 66. On 15 July 2005 both the plaintiffs appeared before the Segamat Magistrate Court to answer the charge proferred against them.

[30] In my view, the instruction given by DW3 to arrest both the plaintiffs is well within the law. Section 23(1)(a) of the CPC is on his side. A reasonable suspicion that one has committed an offence is enough to trigger the arrest mechanism. The test to be applied at this stage is merely the existence of a reasonable suspicion to believe that the person has committed an offence. The standard is lower than that required to show the existence of a prima facie case. The celebrated case of *Shaaban & Ors v Chong Fook Kam & Anor* gives a complete mechanism how it is innitiated. At p 11 Lord Devlin stated:

> … Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting-point of investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be

exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control. There is first the power, which Their Lordships have just noticed, to grant bail. There is secondly the fact that in such countries there is available only a limited period between the time of arrest and the institution of proceedings; and if a police officer institutes proceedings without prima facie proof, he will run the risk of an action for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act promptly to verify it. In Malaysia the period available is strictly controlled by the Code. Under s 28 the suspect must be taken before a magistrate at the latest within 24 hours. If the investigation cannot be completed in 24 hours and there are grounds for believing that the accusation or information is well founded, under s 117 the magistrate may order the detention of the accused for a further period not exceeding 15 days in the whole. By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate prima facie proof as a prerequisite for arrest …

[31] Further down His Lordship continued:

There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all …

[32] The Court of Appeal in *Saul Hamid bin Pakir Mohamad v Inspektor Abdul Fatah bin Abdul Rahman* [2007] 6 MLJ 47; [2007] 5 CLJ 93 also followed the ruling in *Shaaban & Ors*.

[33] Adverting to the case before me, it seems to me that DW3 did all the right things. He studied the report lodged by the complainant and decided that it involved a seizable offence. He also interviewed both the complainant and the first and second plaintiff. He opined that there was a reasonable suspicion that both the plaintiff could have committed the said seizable offence. He had almost completed his investigations before having both the plaintiffs arrested. There was a reasonable suspicion before the plaintiffs were locked up. He acted promptly. Having completed his investigations, he ordered the immediate release of both the plaintiffs the very next day at 5pm. He did not detain the plaintiffs for any further period than is necessary. He knew that there was a dispute over the said lands. He knew about the series of reports lodged by the plaintiffs. He knew that those reports were being investigated by DW1, who confirmed that indeed the said Chew Teek had purchased the said undivided share over the said lands belonging to the first

plaintiff's brother and who subsequently sold the same to the complainant, Tan Yie Sin and that both Chew Teek and the complainant could not effect the formal transfer of the said undivided share on account of the first plaintiff's caveat over the said lands which is yet to be removed.

[34] DW3 also acted promptly in referring the investigation papers to the learned DPP. Barely two weeks later (on 15 July 2005) both the plaintiffs were in court to face the consequences of their actions. The reasonable suspicion harboured by DW3 crystalised into prima facie proof or evidence in the hands of the public prosecutor.

[35] I could find no fault with what DW3 did. He had acted reasonably in his actions before ordering the arrests of the plaintiffs. Plainly, there was a reasonable suspicion on his part that both the plaintiffs had committed the offence as complained by the complainant and had both the plaintiffs arrested. The arrests of both the plaintiffs were proper and lawful in all the circumstances of the case.

[36] I would thus dismiss both the plaintiffs' claim with costs.

Plaintiffs' claim dismissed with costs.

Reported by Kohila Nesan